

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

FILED

October 26, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

**MAHMOUD ALDURIDI, HOLLY J.
ENOCH, WILLIAM J. FALCONE,
TONYA D. FEURY, CARMEL
JOHNSON, MELISSA JOHNSON,
SANNYU OBARD, NATHAN K.
SMITH, TONYA M. SMITH and
RUTH WILLEY,**

Plaintiffs,

**CARMEL JOHNSON, MELISSA
JOHNSON, SANNYU OBARD and
RUTH WILLEY,**

Plaintiffs-Appellants,

Vs.

Davidson Chancery No. 98-611-II
C.A. No. 01A01-9901-CH-00063

**COMMUNITY TRUST BANK, N.A.,
FIFTH THIRD BANK, HYUNDAI
MOTOR FINANCE COMPANY, INC.,
and NATIONSBANK OF TEXAS, N.A.,**

Defendants,

**HYUNDAI MOTOR FINANCE
COMPANY, INC. and NATIONSBANK
OF TEXAS, N.A.,**

Defendants-Appellees.

D I S S E N T

CRAWFORD, J.

I must respectfully dissent from the majority opinion. I agree with the majority's statement of facts. I also agree that the pivotal issue in this case centers on the limits of 16 C.F.R. § 433.2 (1976), the FTC Holder Rule, and the Holder rule should be interpreted to allow the consumer to recover from the assignee amounts paid under the contract to both the assignee and the seller.

I disagree with the majority in concluding that "separating Hillman's obligation to pay off the liens from the purchase of the new vehicles would be contrary to the spirit of the Holder Rule and the reason for its adoption." I conclude to the contrary that the purpose of FTC Holder Rule, to grant a consumer recourse by allowing a consumer to stop payments and in certain circumstances to provided for a return of monies paid on the account, *Ford*, 536 N.E.2d at 589;

Simpson, 32 F.Supp. 2d at 410; *Home Savings*, 733 S.W. 2d at 136 (Tex. 1987), would not be offended by separating the installment contract from the obligation to pay off the lien. In the instant case the notice required by the FTC Holder Rule applies only to the installment contract and not the entire sales transaction.

The court in *LaBarre v. Credit Acceptance Corp.*, 11 F.Supp. 2d 1071(D. Minn. 1998) *reversed in part and affirmed in part*, 175 F.3d 640, held that the plaintiff could not maintain an action against the assignee-creditor under the Holder Rule. In *LaBarre* the plaintiff stopped making payment on an installment contract based on a claim that the dealer did not obtain insurance for the automobile and had therefore breached its contractual obligation. In that case as in the instant case the plaintiff did not allege that the assignee-creditor had failed to perform. Concerning the notice requirement contained in the Holder Rule the court stated:

CAC, as the assignee of the contract, does not inherit all liability that may attach to the dealer, and the Court does not find it at all clear that there is any dealer liability here. A claim is only good against an assignee to the extent it diminishes or extinguishes an assignee's claim. It cannot be used to impose liability on the assignee, unless the assignee has assumed the assignor's duty of performance. (citation omitted).

Id. at 1076.¹

In *Briercroft Service Corporation v. De Los Santos*, 776 S.W.2d 198 (Tex. Ct. App.1988) the contract was made up of four separate documents that “constituted the transaction”. *Id.* at 204. The requisite FTC notice was provided on the Truth in Lending Disclosure. *Id.* at 204-05. Although the court found no liability it stated that “a creditor's derivative liability for seller misconduct, if any, under the FTC Rule is limited to the amount paid by the customer under the credit contract.” *Id.* at 205 (citing *Home Savings v. Guerra*, 733 S.W. 2d 134, 136 (Tex. 1987)).

Applying the reasoning of the courts in the aforementioned cases to the instant case, NationsBank should not be held liable to the plaintiffs for non- payment of the liens by the Hillman. The agreements by Hillman to pay off the plaintiffs's liens were separate transactions and were not assigned to NationsBank when the installment contracts were assigned. I find no provision of the installment contract assigned to NationsBank that requires seller to pay off a lien

¹ *Id.* affirmed in part for the proposition cited; rev'd in part on other grounds, 175 F.3d 640 (8th Cir. 1999).

on the trade-in vehicle. The assignment of the installment contracts to NationsBank did not impose liability for payment of the liens, as NationsBank did not assume the duty of that performance. Rather, the duty of payment of the liens remained with Hillman, as did the benefit of the control of the traded-in automobiles.² The majority apparently overlooks that the assignee's liability for any sum is determined by the contract and the payments made thereunder. The Willey contract specifically shows a total down payment of \$1,300.00, consisting of the net trade-in of \$800.00 plus a cash down payment of \$500.00. Thus, in my opinion, this would constitute the amount paid to the seller under the contract. The Obard contract lists the cash down payment of \$500.00 and a net trade-in allowance of \$2,900.00 for a "total down-payment" of \$3,400.00. In my opinion, this would be the amount paid under the contract.

The assignment of the installment contract by Hillman to NationsBank was limited to the right to receive installment payments from the plaintiffs in exchange for providing financing for the automobiles purchased by the plaintiffs. The notice provision required by the FTC Holder Rule should not be construed to engraft liability or rights to an assigned installment contract not contracted for in the installment contract. Such an interpretation would place in the hands of the consumer the very "affirmative weapon" against the assignee-creditor, NationsBank, not contemplated by the FTC rule. *See Patton II* *5.

Although the appellants are entitled to recover amounts paid under the contract to both the assignee and seller, the amount recoverable should be limited to the amounts paid to the assignee and the amounts paid to the seller as downpayments under the contracts.

I would modify the order of the trial court accordingly.

**W. FRANK CRAWFORD,
PRESIDING JUDGE, W.S.**

² Part of the down payment for the purchase of the vehicle is the "net trade-in" which is the difference between the value of the vehicle and the balance due on the finance contract.